Supreme Court, U.S.
FILED
MAR 12 1992
OFFICE OF THE CLERK

91-1474

No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NICHOLAS G. FARRINGTON, *pro se*,
Petitioner,

v.

THE BUREAU OF NATIONAL AFFAIRS, INC., *et al*,
Respondents.

On Petition For A Writ Of Certiorari To The District Of Columbia Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

NICHOLAS G. FARRINGTON

Pro se Petitioner
202 Congressional Lane
Rockville, MD 20852
(301) 770-0827

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Does malicious libel enjoy constitutional protection in the form of an absolute privilege for an employer when false and defamatory statements are made in a job performance evaluation consented to by the employee but not executed in good faith by the employer?

2. Are all pro se litigants facing summary judgment in a state or federal trial court entitled to a warning from the court of the consequences of not filing affidavits?

PARTIES TO THE PROCEEDINGS

Petitioner is Nicholas G. Farrington.

Respondents are the Bureau of National Affairs, Inc. (BNA) and two of its supervisors in the Editorial Department, Valeria Bowman and Patricia Westlein.

TABLE OF CONTENTS

OPINIONS BELOW 6

JURISDICTION 7

CONSTITUTIONAL PROVISIONS 8

STATEMENT OF THE CASE 8

A. The Facts 8

B. The Proceedings 12

C. The Federal Questions . . . 18

REASONS FOR GRANTING

PETITIONER'S WRIT 23

I. THE DISTRICT OF COLUMBIA COURT OF APPEALS ERRONEOUSLY DETERMINED THAT EMPLOYERS ENJOY COMPLETE IMMUNITY FROM LIABILITY IF THEY MAKE JOB PERFORMANCE EVALUATION STATEMENTS CONSENTED TO BY THEIR EMPLOYEES AND THAT MALICE, FALSITY, DISHONESTY AND UNFAIRNESS ARE NOT RELEVANT CONSIDERATIONS. 23

II. ALL TRIAL COURTS SHOULD NOTIFY ALL PRO SE LITIGANTS FACING SUMMARY JUDGMENT OF THE REQUIREMENTS OF THE SUMMARY JUDGMENT RULE TO ENSURE THAT THESE LITIGANTS WILL HAVE AN ADEQUATE OPPORTUNITY TO COMPLETE DISCOVERY AND FILE AFFIDAVITS. 45

CONCLUSION 47

TABLE OF AUTHORITIES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 21

Cary v. AT&T, NJ SuperCt, LawDiv, Essex Cnty, No. W-027817-87, 12/18/91 . . 29

Celotex v. Catrett, 477 U.S. 317(1986).21

Chapman v. Lord Ellesmere [1932] 2 K.B. 431 39

Exxon v. Schoene, 508 A.2d 142 (Md.App. 1986) 33

Garrison v. Louisiana, 379 U.S. 64, 75 (1964) 26

General Motors Corp. v. Piskor, 277 Md. 165 352 A.2d 810 (1976) 34

Hughley v. McDermott, 530 A.2d 13 (Md.App. 1987), aff'd 561 A.2d 1038 (Md. 1989) 33

Joftes v. Kaufman, 324 F.Supp. 660 (D.D.C. 1971) 16,19,36

Kraft v. W. Alanson White Psychiatric Found., 498 A.2d 1145 (D.C. App.1985). 35

Krasinski v. United Parcel Service, 530 N.E.2d 468, 471 (Ill. 1988) 32

Linn v. Plant Guard Workers, 383 U.S. 53, (1966) 18, 19

Luttrell v. United Telephone System, Inc., 683 P.2d 1292, 47 ALR4th 669 at 673 (Kan.App. 1984), aff'd 695 P.2d 1279 (Kan. 1985) 30

Mandelblatt v. Perelman, 683 F.Supp. 379, 385 (S.D.N.Y. 1988) 32, 41

McDermott v. Hughley, 561 A.2d 1038 (Md. 1989) 34

McDonald v. Smith, 472 U.S. 479 (1985).26

Milkovich v. Lorain Journal Co., __ U.S. __ 110 S.Ct. 2695,(1990) 22

Poller v. CBS, 368 U.S. 464, 473(1962).20

Rogozinski v. Airstream by Angell, 377 A.2d 807, 816 (N.J. Super. 1977) . . 28

Rosenblatt v. Baer, 383 U.S. 75 . . . 22

NO. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

NICHOLAS G. FARRINGTON, pro se,

Petitioner,

v.

THE BUREAU OF NATIONAL AFFAIRS, INC., et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the District of Columbia Court of Appeals

Petitioner Nicholas G. Farrington, pro se, hereby petitions this Court to issue a writ of certiorari to review the judgment and opinion of the District of Columbia Court of Appeals.

OPINIONS BELOW

The opinion of the District of

Columbia Court of Appeals is reported at 596 A.2d 58 (D.C.App. 1991), and is reprinted in the appendix hereto, p. A1, infra.

The per curiam order of the District of Columbia Court of Appeals on the petition for rehearing or rehearing en banc, has not yet been reported, and is reprinted in the appendix hereto, p. A7.

The order of the Superior Court of the District of Columbia granting summary judgment to respondents, is reprinted in the appendix hereto, p. A8.

JURISDICTION

1. On November 13, 1991, the District of Columbia Court of Appeals denied the timely petition for rehearing or rehearing en banc of its September 13, 1991 judgment.

2. On February 5, 1992, Chief Justice Rehnquist of the United States

Supreme Court signed an order granting an extension of time within which to file a petition for writ of certiorari to and including March 12, 1992.

3. This Court has jurisdiction under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall . . . deprive any person of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

A. The Facts

1. The pro se petitioner in this

action for libel and slander is Nicholas G. Farrington. He is not an attorney nor did he ever attend law school; he took two paralegal courses at the University of Maryland to aid in his quest for justice in this matter. Petitioner is a 1978 graduate of Syracuse University's School of Public Communications. Respondents are the Bureau of National Affairs, Inc. (BNA) and two of petitioner's former supervisors in the Editorial Department at BNA, Valeria Bowman and Patricia Westlein.

2. The precipitating event took place on May 27, 1987, when Bowman, then-supervisor of the reference file section of BNA's publication Environment Reporter, handed Farrington a job performance evaluation form she had completed and signed and told him that he had failed probation as a reference file editor. A discussion ensued between Farrington and

Bowman about the fairness and honesty of the evaluation process, the standards and criteria used, and the devastating effect her decision would have on Farrington's career and personal life. Bowman was adamant and told Farrington he would be returned to his former position as a Production Department proofreader. A copy of the evaluation form was placed in Farrington's personnel file for others to read.

3. The words used by Bowman in her written evaluation characterized the quality of Farrington's work as "unsatisfactory," "not careful," "unreliable," and contained "inaccuracies in mark up." (The D.C. Court of Appeals opinion contains a fuller recitation of the defamatory comments in footnote 1. See Appendix, p. A1.)

4. Petitioner appealed to Bowman's

immediate supervisor, Westlein, who had co-signed Farrington's evaluation, but she too was adamant and backed up Bowman's decision. In extreme humiliation, Farrington removed his belongings from his desk and moved from the fourth floor Editorial Department to the first floor Production Department while his coworkers watched.

5. Petitioner was covered by a collective bargaining agreement between BNA and The Newspaper Guild and, although not a member of the union, he appealed to a union steward within a few days of failing probation. After an investigation by the steward and discussions between the union and BNA's labor relations office, a series of memos was sent between the two. In the end, petitioner learned that years earlier BNA and the union had made an agreement that failure of probation was

outside the coverage of the collective bargaining agreement and was not grievable. There was no hearing or arbitration of petitioner's dispute.

6. During the investigation of petitioner's complaint, without petitioner's knowledge or consent, labor relations sent copies of defamatory memos regarding Farrington's failure of probation to BNA's president and senior vice president. When petitioner learned of this, it intensified his feelings of humiliation because he had been serving faithfully and well on the company's Suggestions Committee, a post petitioner was appointed to by BNA's president.

B. The Proceedings

1. On May 26, 1988 petitioner filed a sworn, pro se complaint for libel and slander against respondents in the Superior Court of the District of Columbia

alleging that reports evaluating his performance were "false, defamatory and connote that plaintiff is incompetent in his profession." The complaint alleged that "Valeria Bowman and Patricia Westlein conspired, with malice, to deny him permanent status in the editorial position for which plaintiff was serving a probationary period." The complaint further alleged that throughout petitioner's life he had "been known for the high quality of his work" and that he had been "greatly injured in his good name, reputation and in pursuance of his profession, and in the high regard, respect, confidence and esteem he enjoyed among his professional colleagues, relatives, friends, neighbors and acquaintences."

2. Petitioner amended his complaint the following day to include: (a) "A

copy of the form containing defamatory statements was sent to BNA's Personnel Office where it was seen and read." (b) "The false and defamatory statements were circulated among many other persons, both in writing and orally." (c) "Valeria Bowman and Patricia Westlein are to be regarded as individual defendants as well as agents of BNA." (d) "Plaintiff was returned to his former job at BNA as a proofreader by defendant Valeria Bowman, and this movement has caused him much humiliation and mental anguish."

3. Respondent BNA filed an answer in behalf of its two supervisors on June 14, 1988, and through outside counsel deposed Farrington for a total of approximately 15 hours on September 30 and October 7, 1988. Petitioner deposed respondent Bowman for approximately two hours on October 14, 1988.

4. On October 12, 1988, the 120 day discovery period officially ended. Petitioner filed a motion for enlargement of time for discovery on October 28, citing Super.Ct.Civ.R. 26(e) which provided: "The Court will be receptive to motions for enlargement of time for discovery under paragraph (e) in complex, Civil II nonjury actions . . . ." (Emphasis added.) The case at bar was such an action. On May 1, 1989 petitioner's motion was denied.

5. On October 31, 1988 respondents filed motions for summary judgment and for a protective order to stay further discovery. Petitioner filed his opposition to summary judgment and his statement of material facts in genuine dispute on December 21, 1988. In his opposition, petitioner described several ways in which his case could be

distinguished from the one relied upon most heavily by respondents, Joftes v. Kaufman, 324 F.Supp. 660 (D.D.C. 1971). Petitioner claimed that his consent was either strictly limited or totally null and void. Petitioner further contended that the appropriate privilege in employment situations is a qualified, not an absolute one. In addition, petitioner listed several material facts in genuine dispute: the truth or falsity of the evaluation statements; the extent of their dissemination; whether conspiracy or malice were involved; whether there was publication by act or gesture; and whether respondents were reckless in their disregard for his reputation.

6. Respondents' motions for summary judgment and for a protective order were granted on May 1, 1989. Summary judgment was granted on the grounds that

respondents enjoyed an absolute privilege to defame. The Court held that petitioner consented to a written evaluation of his performance and that his claim was precluded as a matter of law. On May 18, 1989 petitioner filed a motion for reconsideration, but it was denied on June 15, 1989.

7. Petitioner appealed to the District of Columbia Court of Appeals on June 23, 1989. That court affirmed the judgment of the trial court on September 13, 1991 and subsequently denied a timely petition for rehearing or rehearing en banc. Throughout the proceedings petitioner has maintained that he was entitled to, but never received, a fair and honest evaluation of his job performance.

8. Farrington now petitions this Court for a writ of certiorari so that it

can be definitively decided what privilege is available to employers in the course of evaluating employee job performance if the employee consents.

C. The Federal Questions

The central federal question in this case is: Does malicious libel enjoy constitutional protection in the form of an absolute privilege for an employer when an employee has consented to an evaluation of his job performance, despite the U.S. Supreme Court's proclamation in Linn v. Plant Guard Workers, 383 U.S. 53, 63 (1966), that "malicious libel enjoys no constitutional protection in any context"?

Petitioner first raised this federal question in his opposition to summary judgment (Record in Appeal No. 89-724, p. 118) under the heading, "The Evaluations Are Not Absolutely Privileged." Petitioner stated:

> [T]he Joftes Court [Joftes v. Kaufman, 324 F.Supp. 660, 663 (D.D.C. 1971)], after acknowledging that "the Court has found no precedent precisely in point," asserted that "settled principles in the law of defamation support an absolute privilege for the letters in question." The Joftes Court then immediately states the following: "The publication even of a malicious libel is absolutely privileged if the person defamed consents thereto. Restatement of Torts, §583 (1938)." This statement appears to be in direct conflict with a declaration of the U.S. Supreme Court in Linn v. Plant Guard Workers, 383 U.S. 53, 63 (1966), "malicious libel enjoys no constitutional protection in any context."

(Emphasis added.)

The only way the Superior Court of the District of Columbia addressed this federal question of conflict in Farrington v. Bureau of National Affairs, Inc., et al., was by issuing its order reaffirming its adoption of the Joftes rule of law. In fact, the trial court in Farrington quoted in its summary judgment order the very sentence from Joftes that petitioner

quoted in his opposition to summary judgment: "The publication even of a malicious libel is absolutely privileged if the person defamed consents thereto." However, the Superior Court judge ignored or overlooked the conflict with the statement made by the Linn Court. The court below simply used the Joftes quote to assert what it considered the validity of its position.

Petitioner cited, quoted and used in argument for various propositions other U.S. Supreme Court cases. In petitioner's "Opening Statement" to his opposition to summary judgment, he cited Poller v. CBS, 368 U.S. 464, 473 (1962) for the proposition that "summary procedures should be used sparingly in complex . . . litigation where motive and intent play leading roles." In petitioner's first brief on appeal (Appeal No. 89-724), he

cited Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) for the proposition (in footnote 5 of that opinion) that "summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." Later, in petitioner's second appeal (Appeal No. 90-1033), he again cited Anderson and added Celotex v. Catrett, 477 U.S. 317 (1986) for the proposition that adequate opportunity for discovery is essential before summary judgment is granted. In addition, petitioner pointed out that there is a conflict among the courts regarding notification of the requirements of Rule 56. He cited a comprehensive Note on the subject: An Extension of the Right of Access: The Pro Se Litigant's Right to Notification of the Requirements of the Summary Judgment Rule, 55 Fordham L. Rev.

1109 (1987).

Finally, petitioner cited Rosenblatt v. Baer, 383 U.S. 75 and Milkovich v. Lorain Journal Co., __ U.S. __, 110 S.Ct. 2695 (1990) and quoted pertinent language from those defamation cases in the "Introduction" to his appeal brief in Appeal No. 89-724. Rosenblatt was cited in part for the proposition that "an action for damages is the only hope of vindication or redress the law gives to a man whose reputation has been falsely dishonored." Milkovich was cited in part because 'objectively verifiable' defamatory statements damaged him in his occupation as a teacher and coach.

Neither the trial court nor the appellate court addressed any of the issues presented in these United States Supreme Court cases as they related to the case at bar.

REASONS FOR GRANTING PETITIONER'S WRIT

I. THE DISTRICT OF COLUMBIA COURT OF APPEALS ERRONEOUSLY DETERMINED THAT EMPLOYERS ENJOY COMPLETE IMMUNITY FROM LIABILITY IF THEY MAKE JOB PERFORMANCE EVALUATION STATEMENTS CONSENTED TO BY THEIR EMPLOYEES AND THAT MALICE, FALSITY, DISHONESTY AND UNFAIRNESS ARE NOT RELEVANT CONSIDERATIONS.

Simply stated, on November 13, 1991, the District of Columbia Court of Appeals made clear, by denying petitioner a rehearing or rehearing en banc, that if someone works for any employer in the District of Columbia that gives job performance evaluations, the consenting employee can be lied about without redress in the courts. This untenable judicial result renders fundamental fairness and a cause of action unavailable to hundreds of

thousands of citizens who work in the District of Columbia, regardless of whether they work for public or private employers, and regardless of whether their consent is express or implied.

The potentially destructive effects of the D.C. Court's decision on the jobs, careers and personal lives of these hundreds of thousands of working people is mind boggling. Equally disturbing is that the potentially destructive effects will continue unabated unless and until this Court overrules the judgment of the court below.

This case brings into sharp focus a serious conflict between the law of defamation and First Amendment rights in employment situations. On one hand, there is the public policy of society's strong interest in preventing and redressing attacks upon reputation, and on the other

hand is the First Amendment's guarantee of free and uninhibited discussion.

Stated another way, this case concerns the valid interests of employees in being evaluated honestly and fairly and in preventing and redressing attacks upon their reputations versus the equally valid interests of employers in disseminating pertinent information about those who work for them.

Petitioner contends that this Court must draw the line and firmly state that in a situation such as this only a qualified privilege shall apply and not an absolute privilege. Absolute privileges have been allowed by this Court and others in very limited situations. In 53 C.J.S. Libel and Slander §102 (1948), "Absolute Privilege," the following sentence is pertinent: "The class of occasions where the publication of defamatory matter is

absolutely privileged is, however, confined within narrow limits, and the courts as a rule have steadily refused to enlarge those limits." Id. at 164.

Chief Justice Burger, writing for the Court in McDonald v. Smith, 472 U.S. 479 (1985), stated emphatically: "We hold that the Petition Clause does not require the State to expand this privilege into an absolute one. The right to petition is guaranteed; the right to commit libel with impunity is not." Id. at 485. Justice Brennan, with whom Justices Marshall and Blackmun joined, concurring, said, "I fully agree with the Court that the Petition Clause imposes no such absolute privilege. Id. at 486.

Justice Brennan, in McDonald at 487, also quoted generously from Garrison v. Louisiana, 379 U.S. 64, 75 (1964), as will petitioner:

> At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even to topple an administration. . . . That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is a once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .' Chaplinsky v. New Hampshire, 315 U.S. 568, 572. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Applying some of Garrison's language regarding human behavior (such as "use of the known lie as a tool") to the employment context, one can readily understand why an absolute privilege

should not be allowed employers when they are evaluating their employees. The potential for serious, devastating harm to employees' reputations is ever-present during such evaluations and employees need the protection of a qualified privilege. A bad faith or malice standard for overcoming the privilege would afford employers protection as well.

The common law of most states recognizes a qualified privilege for employers in most situations and an extensive treatment of the subject can be found in "Defamation -- Employer's Qualified Privilege," 24 ALR4th 144 et seq. Several states have applied a qualified privilege to statements made in employment evaluations consented to by employees.

The New Jersey court in Rogozinski v. Airstream by Angell, 377 A.2d 807, 816

(N.J. Super. 1977) stated clearly: "No New Jersey cases have held that defamatory communications made at the instigation of or with the consent of an individual are absolutely privileged per se." In a very recent New Jersey defamation case a jury awarded an employee $465,000 in compensatory and punitive damages because her employer defamed her in a job performance evaluation. Cary v. AT&T, NJ SuperCt, LawDiv, Essex Cnty, No. W-027817-87, 12/18/91. The employee said the negative comments were due to the personal animus of one manager and that they damaged her reputation.

AT&T claimed the comments were only personal opinions of the manager and that they were not actionable. AT&T has asked the judge to set aside the verdict. The company's counsel was quoted as saying of the verdict, "It's very chilling for

corporations," and adding that managers faced with liability for defamation "won't give appraisals at all or will give watered down appraisals, which defeats the whole purpose" of performance evaluations. The precedent could "really cripple managers and cripple employees who want to improve," said AT&T's counsel.

Respondents in the case at bar presented a similar argument in their memorandum in support of summary judgment:

> . . . from a policy standpoint the process of candid employee evaluations is crucial to the efficient operation of a business. If the opinions expressed in evaluations were deemed actionable in defamation cases, meaningful evaluation of employees would disappear.

Record in Appeal No. 89-724, p. 69.

A remarkably similar point was made by the defendant in Luttrell v. United Telephone System, Inc., 683 P.2d 1292, 47 ALR4th 669 at 673 (Kan.App. 1984), aff'd

695 P.2d 1279 (Kan. 1985). However, the Kansas court gave a well-reasoned response, providing a balance between the interests of the employer and employee. Luttrell states in pertinent part:

> Defendant argues that corporate employers must be free to evaluate and comment on their employees' work performance and that this freedom will be unduly restrained if they are liable for intracorporate defamation. However, the law in this state has already extended protection to comments made within a work situation by means of a qualified privilege. A communication is qualifiedly privileged if it is made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, if it is made to a person having a corresponding interest or duty. . . . By virtue of the qualified privilege, the employer who is evaluating or investigating an employee in good faith and within the bounds of the employment relationship is protected from the threat of defamation suits by the enhanced burden of proof which the plaintiff would have to bear. We see no reason for greater freedom from liability for defamation to be accorded the corporate employer than that already available to all employers through the qualified privilege.

683 P.2d 1292, --. (Emphasis added.)

In the New York case of Mandelblatt v. Perelman, 683 F.Supp. 379, 385 (S.D.N.Y. 1988) the court enunciated its position on this subject, thus:

> It is beyond dispute that an employer's agents must be free, within certain bounds, to communicate with it regarding the performance of persons in its employ. This freedom, however, arises not under the rubric of consent, but under that of qualified privilege.

(Emphasis added.)

In Krasinski v. United Parcel Service, 530 N.E.2d 468, 471 (Ill. 1988), cited in Farrington's opposition to summary judgment (Record in Appeal No. 89-724, p. 119), the Illinois Supreme Court makes clear what privilege is to be applied in employment defamation cases: "If the defamation claim arises out of an employer-employee relationship, the plaintiff may be confronted with a qualified privilege." (Emphasis added.)

Both the Maryland Court of Special Appeals and the state's highest court, the Court of Appeals, have refused to adopt an absolute privilege for consent defense. See Exxon v. Schoene, 508 A.2d 142 (Md.App. 1986) and Hughley v. McDermott, 530 A.2d 13 (Md.App. 1987), aff'd 561 A.2d 1038 (Md. 1989). In Exxon, the Maryland Court of Special Appeals acknowledged that "[t]here is authority recognizing an absolute common law privilege for defamation where the party defamed consents to its publication," and cited cases from Missouri and Colorado. The court analyzed §583 of the Restatement (Second) of Torts (1977), including comment d of that section -- the same section and comment relied upon by the Joftes and Kraft courts in the case at bar. Ultimately, the Maryland court rejected the consent defense and applied a

qualified privilege. 508 A.2d at 146-147.

In McDermott v. Hughley, 561 A.2d 1038 (Md. 1989), the Maryland Court of Appeals also applied a qualified privilege instead of an absolute privilege based on consent. The court stated: "We have recognized numerous instances where a qualified privilege is appropriate. For example, communications arising out of the employer-employee relationship clearly enjoy a qualified privilege. General Motors Corp. v. Piskor, 277 Md. 165 352 A.2d 810 (1976)" Id. at 1046. (Emphasis added.) The McDermott court acknowledged cases from four other jurisdictions that have recognized some form of a consent defense and stated that "[t]hose cases rely primarily on the Restatement (Second) of Torts, §583 (1977) view that consent is a complete defense to an action for defamation." Then, in petitioner's view,

the court struck a somewhat ominous note: "Although that Restatement section heretofore has not been adopted as the law of this State, we acknowledge its wisdom today." Id. at 1046. Perhaps on another day, influenced by the D.C. Court of Appeals' holding in Farrington, the Maryland Court of Appeals, in its "wisdom," will adopt the complete defense of an absolute privilege for consent. This is all the more reason for the Supreme Court of the United States to grant petitioner's writ of certiorari and ultimately to rule in his favor in this case.

In affirming summary judgment in the case at bar, the District of Columbia Court of Appeals relied on Kraft v. W. Alanson White Psychiatric Found., 498 A.2d 1145 (D.C. App. 1985); and in its summary judgment ruling, the Superior Court relied

on both Kraft and Joftes v. Kaufman, 324 F.Supp. 660 (D.D.C. 1971). On January 15, 1971, Judge Gerhard Gesell, of the U.S. District Court for the District of Columbia, enunciated new defamation law for the District of Columbia in Joftes:

> Though the Court has found no precedent precisely in point, settled principles in the law of defamation support an absolute privilege for the letters in question. The publication even of a malicious libel is absolutely privileged if the person defamed consents thereto. Restatement of Torts §583 (1938). In comment (d) to §583, the authors of the Restatement in discussing the law of absolute privilege draw attention to an analagous situation:
>
> > Moreover, one who agrees to submit his conduct to investigation, knowing that its results will be published, consents to the publication of the honest findings of the investigators. Such a consent may be derived from voluntary membership in an association, the rules of which provide for an investigation * * *.

Id. at 663.

In making the new law, the District

Court: (1) overlooked or ignored one very important word in quoting the Restatement; (2) misinterpreted the Restatement; and (3) apparently failed to read some of the case law the Restatement was based on.

The Court overlooked or ignored the exceedingly important word "honest" in the sentence, "Moreover, one who agrees to submit his conduct to investigaton knowing that its results will be published, consents to the publication of the honest findings of the investigators." (Emphasis added.)

The error of overlooking the word "honest" was compounded by the omission of "(See Illustration 3)" which, in the District Court's opinion, was replaced by three asterisks. Id., at 663. (See quoted passage above.) The omission, although seemingly minor, was in petitioner's view, very significant

because it points to the misinterpretation of the Restatement.

Illustration 3, in its entirety, states:

> 3. A, a horse trainer, holds a license granted by the B Racing Association, a rule of which empowers the stewards of the club to suspend licenses, to inquire into and deal with matters concerning racing, and to publish the result in a racing magazine. The stewards, upon a fair and honest investigation of a particular race, publish their findings in the racing magazine, stating that the horse that A trained had been drugged and that A's license has been withdrawn. A has consented to the publication.

(Emphasis added.)

Again, the Restatement uses the word "honest" -- this time to qualify "investigation" -- and, it adds the word "fair" as a qualifier. These words are used for good reason and by overlooking them the District Court misinterpreted comment d of §583. In petitioner's view, the Restatement Illustration means that a

person's consent is limited to only fair and honest investigations (or evaluations) and thus unfair and dishonest ones are not covered by the consent.

According to the Reporter's Note for §583, Restatement of Torts, (Second), (1977), "Illustration 3 is taken from Chapman v. Lord Ellesmere [1932] 2 K.B. 431." This is a famous British case that runs 47 pages, not counting the appendix. The pertinent facts of Chapman are as described in Illustration 3 of §583. References to fairness, honesty and good faith are made throughout the many pages of the case. On page 440, the Court said: "Publication of any decision of the stewards was authorized so long as the stewards exercised their power bona fide." (Emphasis added.)

On pages 450 and 451 of Chapman, Lord Hanworth, M.R., stated:

> It was for that tribunal [the stewards' hearing] to embody its decision in its own terms, provided it acted bona fide, honestly intending to act in accordance with its determination. . . . The matter was within the jurisdiction of the stewards and, if the inquiry is conducted fairly and properly, there is no appeal from their decision. . . . provided always that the conduct of the tribunal has been honest and bona fide.

(Emphasis added.)

Petitioner's brief on appeal contains the following pertinent statement:

> Farrington limited his consent to a fair and honest evaluation -- not to an unfair and dishonest one. Whether Farrington's evaluation by his supervisors was fair and honest is clearly a genuine issue of material fact. Further, it is unreasonable and irrational for defendants to assert that anyone would consent to an unfair and dishonest evaluation.
>
> Joftes and Kraft never addressed the fairness and honesty issue. Those cases are therefore distinguishable from the present case.
>
> Plaintiff Farrington strongly asserts that his evaluation was unfair and dishonest and was a sham. In essence, it was not an evaluation at all. The supervisor in this case must have and be able to articulate a

> rational, reasonable basis for her decision using an objective standard of review. She did not do so.

Plaintiff-Appellant's Brief in Appeal No. 89-724, p. 11.

Petitioner's argument regarding consent and the necessary fairness and honesty of evaluations receives important support and cogent explication from Mandelblatt v. Perelman, 683 F.Supp. 379 (S.D.N.Y. 1988):

> While it is customary to group the consent defense together with the "absolute privileges," an important distinction between the two must be observed. "Communications afforded an absolute privilege are perhaps more appropriately thought of as cloaked with an immunity . . ., which protects communications irrespective of the communicant's motives . . . " [citation omitted] . . . while recovery is barred by consent only to the extent that the communication sued upon falls within the scope of the consent. Restatement (Second) of Torts, §583, Comment d. . . . Moreover, "one who agrees to submit his conduct to investigation knowing that its results will be published, consents to the honest findings of the investigators." Restatement of Torts, §583, Comment d (emphasis

> added). Finally, the scope of the consent, if ambiguous, is for the jury to determine. [citation omitted]

Id. at 383. (The Mandelblatt court emphasized the word "honest") Mandelblatt continues in a similar vein: "Plaintiff's consent clearly extended only to hearing procedures conducted in good faith. He must therefore be given the opportunity to prove to the jury that the statements published to the Board . . . were made in bad faith." Id. at 384. (Emphasis added.)

As noted, the Mandelblatt court emphasized the word "honest" in its quotation of the Restatement of Torts, §583, comment d. Significantly, Harper, James and Gray, The Law of Torts (2nd Ed., 1986), in quoting the very same sentence from §583, also emphasized the word "honest." Id., §5.17 at p. 139, footnote 18.

Having explained the importance of honesty, good faith and fairness in a proper application of the consent privilege according to comment d of §583, petitioner now turns to comment b of the same section of the Restatement. Comment b of the 1938 version of the Restatement (the version relied upon by the Joftes court), in its entirety, states:

> b. The word "consent" is used to describe an assent of such a character as to be legally effective to prevent a publication from being tortious (compare §§49, 252). Therefore, it does not include an assent obtained by fraud or duress or from one lacking capacity to give consent.

(Emphasis added.)

Comment b of §583 of the Restatement (Second) of Torts (1977), in its entirety, states:

> b. The rule stated in this Section is an application of the general rule on the effect of the plaintiff's consent stated in §892. The rules stated in §§892 to 892D and the Comments to those Sections are

> applicable here so far as they are pertinent. Thus the consent may be ineffective to bar recovery for defamation if it is obtained by fraud or duress or is given by one who lacks the capacity to consent.

(Emphasis added.)

The pro se petitioner in the case at bar submits that the language just quoted has a bearing on the just resolution of this matter and respectfully requests that this Court analyze the language and the sections referred to in it. Petitioner performed a partial analysis of the referred to sections in his brief on appeal but admits that, due to lack of knowledge and experience in the law, his analysis may be inadequate. According to Barron's Law Dictionary, Second Ed. (1984), the term "good faith" means "a total absence of any intention to seek an unfair advantage or to defraud another party; an honest and sincere intention to fulfill one's obligations."

II. ALL TRIAL COURTS SHOULD NOTIFY ALL PRO SE LITIGANTS FACING SUMMARY JUDGMENT OF THE REQUIREMENTS OF THE SUMMARY JUDGMENT RULE TO ENSURE THAT THESE LITIGANTS WILL HAVE AN ADEQUATE OPPORTUNITY TO COMPLETE DISCOVERY AND FILE AFFIDAVITS.

When he was first faced with a motion for summary judgment, the pro se petitioner in this case did not know how important it was to obtain and file affidavits to support his statement of material facts in genuine dispute. He did not learn of the importance of affidavits until well after appealing to the higher court. If petitioner had known of their value he certainly would have spent more time and energy trying to get the affidavits than in researching the law and writing his opposition to summary judgment. Petitioner was holding down a

full time job as a proofreader and doing research and writing in his spare time.

If the trial court had given petitioner a notice of the requirements of the summary judgment rule and warned him of the consequences of not getting affidavits, he would have made a concerted effort to get them. Petitioner did not understand that the trial court was not only interested in dispensing justice but was also interested in disposing of his case by whatever means available.

Petitioner now believes that his case would have been in a different posture if the court had given him a notice and he had obtained the necessary affidavits. Arguments to this effect are in petitioner's briefs in Appeal No. 90-1033.

Numerous state and federal courts do give pro se litigants information about the summary judgment rule. However, some

of these courts and some commentators contend that only pro se prisoner litigants should receive such information. Petitioner asserts that all pro se parties dealing with a motion for summary judgment are entitled to notification by the court involved. A reasoned, comprehensive discussion of the subject can be found in the Note, An Extension of the Right of Access: The Pro Se Litigant's Right to Notification of the Requirements of the Summary Judgment Rule, 55 Fordham L. Rev. 1109 (1987).

CONCLUSION

The hours of petitioner's life are passing and he continues to suffer from the reputational harm inflicted upon him on May 27, 1987. Petitioner implores this Court to consider carefully not only his plight but the plight of hundreds of thousands of individuals who, while

working for District of Columbia employers, remain unprotected from false, malicious and defamatory statements on their job performance evaluations.

Petitioner therefore respectfully requests that for all of the foregoing reasons this Court grant his petition for a writ of certiorari.

Respectfully submitted,

NICHOLAS G. FARRINGTON

Pro se Petitioner
202 Congressional Lane
Rockville, MD 20852
(301) 770-0827

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

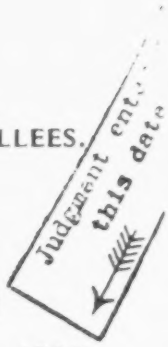
DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 89-724 & 90-1033

NICHOLAS G. FARRINGTON, APPELLANT,

v.

BUREAU OF NATIONAL AFFAIRS, INC., *et al.*, APPELLEES.



Appeals from the Superior Court
of the District of Columbia

(Hon. Henry H. Kennedy, Jr., Trial Judge)

(Argued April 25, 1991 Decided September 13, 1991)

Nicholas G. Farrington, pro se.

Paul E. Mirengoff, with whom *A. Neal Barkus*, was on the brief, for appellees.

Before FARRELL and WAGNER, *Associate Judges*, and GALLAGHER, *Senior Judge*.

GALLAGHER, *Senior Judge*: Appellant sued his employer and his supervisors for defamation based on the limited publication of statements made by his supervisors in an unfavorable evaluation of his work as an editor.[1] The trial

[1] The statements which appellant alleges were defamatory consisted of a characterization of the quality of his work as "unsatisfactory" along with the comments: "[Appellant's] work did not improve to the necessary level of accuracy. Rather, his work continued to reflect an inability to pick up less extensive but important changes and he also

court granted the appellees' motion for summary judgment on the basis that appellant's defamation claim was precluded by the defense of consent which rendered the publication that occurred privileged under the circumstances of this case. Appellant contends the trial court erred in granting the motion for summary judgment and in denying his motion for reconsideration of that ruling.[2] We affirm.

The trial court, citing *Kraft v. W. Alanson White Psychiatric Found.*, 498 A.2d 1145, 1150 (D.C. 1985), concluded, based upon undisputed facts, that the publication which occurred was privileged. The trial court stated:

> First, [appellant] consented to an evaluation of his work. His supervisors were required by a collective bargaining agreement, to which plaintiff was a party, to prepare an evaluation. Second, the statements were all directly relevant to [appellant's] ability to perform in the probationary position. Third, the publication of the statements was limited to supervisory personnel and labor-relations

---

was not careful in crossing out for revision only the language affected. Since these essential skills were not mastered, he did not pass probation." An additional comment was made that: "[Appellant] did not pass probation because of inaccuracies in mark up that he was not able to overcome, thus making his work unreliable."

[2] Appellant initially appealed from the grant of summary judgment. During the pendency of his appeal, appellant requested additional time in which to file his brief on the basis that the transcript of his deposition had not been filed in the trial court. This court denied appellant's request without prejudice to appellant moving for reconsideration of the summary judgment order in the trial court on the same basis. Appellant's motion for reconsideration was denied and he appealed again. Both appeals were consolidated.

> personnel who were pursuing a related grievance for [appellant]. Each of these persons had a legitimate business interest in the subject matter of the statements.

Accordingly, the trial court granted the motion for summary judgment.

I.

Our standard of review on an appeal from summary judgment is the same standard the trial court uses when considering the motion for summary judgment. *Young v. Sherwin-Williams Co.*, 569 A.2d 1173, 1175 (D.C. 1990). The moving party prevails if the court concludes that there is no genuine issue of fact and that the moving party is entitled to a judgment as a matter of law. *Id.*

Consent is an absolute defense to a claim of defamation. A person who consents to the publication of comments about himself has no cause of action for defamation. *Kraft v. W. Alanson White Psychiatric Found., supra,* 498 A.2d at 1150. In this jurisdiction, the defense of consent has been incorporated into a three part analysis. The publication of a defamatory statement is privileged if: (1) there was either express or implied consent to the publication; (2) the statements were relevant to the purpose for which consent was given; and, (3) the publication of those statements was limited to those with a legitimate interest in their content. *Id.* Thus, in moving for summary judgment on the basis that the publication of the statements was privileged, the appellees had the burden to show that there was no dispute that appellant consented to the publication of the evaluation, that the statements contained within the evaluation

were pertinent to his work performance, and that the distribution was limited to those with a legitimate interest in the evaluation.

The gravamen of appellant's argument concerns the first element—the effect of his consent. Appellant does not dispute that he consented to the publication. Rather, he contends that his consent to the publication of the evaluation does not preclude the court from assessing the accuracy of the evaluation. Appellant's argument fails to distinguish between the issue of whether the statements were true and the issue of whether he consented to the publication.

To conclude that appellant consented only to the publication of true statements about his work would render the defense of consent meaningless in this case. Truth is a complete defense to a claim of defamation without regard to whether the one defamed consented to the publication of those statements. *See Global Van Lines, Inc. v. Kleinow*, 411 A.2d 62, 64 (D.C. 1980) (citing *Ford Motor Co. v. Holland*, 367 A.2d 1311, 1313 n.1 (D.C. 1977)). Because appellant effectively agreed to a written evaluation of his work by his supervisors, he consented to the publication of statements within the limitations prescribed by *Kraft v. W. Alanson White Psychiatric Found., supra, i.e.*, the statements must be relevant to the quality of his work, and the publication of those statements must be limited to those with a legitimate work related interest in those statements.

There is no dispute that the statements made by the appellees were relevant to appellant's work performance. Thus, the statements that appellant contends were defamatory were made to effectuate the purpose for which appellant gave his consent, an evaluation of his work per-

formance. Accordingly, there is no genuine issue of fact concerning the second factor cited in *Kraft v. W. Alanson White Psychiatric Found., supra.*

Finally, there is no material issue of fact regarding the publication of the evaluation. Appellant acknowledges that only supervisory personnel and labor-relations personnel, who were pursuing a related grievance for appellant, saw he evaluation. Although he asserts that a clerical worker must have seen his evaluation when it was placed into his file, that publication (assuming it occurred) would hardly amount to excessive publication. Accordingly, there is no genuine issue of fact concerning the third factor cited in *Kraft v. W. Alanson White Psychiatric Found., supra.*

The appellees have met the three conditions necessary to claim the defense of privilege based upon consent as set forth in *Kraft v. W. Alanson White Psychiatric Found., supra.* Undisputed evidence supports the trial court's conclusion that appellees were entitled to judgment as a matter of law.

II.

Appellant also contends the trial court erred in denying his motion for reconsideration, relief from summary judgment, and additional discovery. Although the trial court's original order was based upon undisputed facts, appellant argued that the trial court should have granted his motion for reconsideration because it did not have the complete record available when it granted summary judgment to the appellees. We note that when the trial court ruled on appellant's motion for reconsideration, it had before it the entire record. Appellant had an opportunity to show that the record did not support the trial court's ruling. However,

he did not indicate any basis in the record for concluding the trial court erred, nor was any basis apparent upon review.[3]

Affirmed.

[3] Appellant also contends that the trial court erred in failing to advise him as a *pro se* litigant that he should file affidavits, and therefore that it should have vacated its summary judgment order. Because appellant did not proffer any disputed material issue of fact that would have been raised in an affidavit, his argument is baseless. He also contends that he needed additional discovery to show, in effect, that his evaluation was inaccurate. Since the accuracy of his evaluation was irrelevant to the issue of consent, such additional discovery was unwarranted.

DISTRICT OF COLUMBIA
COURT OF APPEALS

Nos. 89-724 & 90-1033

NICHOLAS G. FARRINGTON,
Appellant,

v. CA4998-88

BUREAU OF NATIONAL AFFAIRS, INC., ET AL.
Appellee

DATE OF ENTRY: November 13, 1991

BEFORE: Rogers, Chief Judge; Ferren, Terry, Steadman, Schwelb, *Farrell, *Wagner, King, Associate Judges; and Gallagher, Senior Judge.

O R D E R

On consideration of appellant's petition for rehearing or rehearing en banc, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION - Civil Actions Branch

NICHOLAS G. FARRINGTON,	:	
	:	
Plaintiff	:	
	:	
v.	:	Civil Action
	:	SA-88-CA-04998
THE BUREAU OF NATIONAL AFFAIRS, INC., VALERIA BOWMAN, and PATRICIA WESTLEIN,	:	
	:	
Defendants.	:	

DATE OF ENTRY: May 1, 1989

O R D E R

The matter presently before the court is the defendants' motion for summary judgment. Upon consideration of the motion, the plaintiff's opposition thereto, the papers filed in support of and in opposition to the motion, the court concludes that the motion should be granted.

The plaintiff has brought an action for defamation of character. His claim relates to statements made by his

supervisors evaluating his employment performance during and at the end of a probationary promotion period. The plaintiff's claim must be precluded as a matter of law as he consented to the written evaluation of his performance. "A person who consents to the publication of comments about himself has no cause of action." Kraft v. W. Alanson White Psychiatric Found, 498 A.2d 1145, 1150 (D.C. App. 1985) adopting Joftes v. Kaufman, 324 F.Supp. 660, 663 (D.D.C. 1970) ("The publication even of a malicious libel is absolutely privileged if the person defamed consents thereto.").

Three factors must be considered in deciding if the statements in question are privileged: (1) if the plaintiff consented to their publication; (2) if the statements made were relevant to the consent; and (3) if the broadcast was

limited to those with legitimate interest in the subject matter. Id. at 1150. First, the plaintiff did consent to an evaluation of his work. His supervisors were required by a collective bargaining agreement, to which the plaintiff was a party, to prepare such an evaluation. Second, the statements were all directly relevant to the plaintiff's ability to perform in the probationary position. Third, the publication of the statements was limited to supervisory personnel and labor-relations personnel who were pursuing a related grievance for the plaintiff. Each of these persons had a legitimate business interest in the subject matter of the statements. Accordingly, it is this 24th day of April, 1989, hereby,

ORDERED, that the defendant's motion for summary judgment is granted.

/s/ Judge H. Kennedy
Henry H. Kennedy, Jr.
Judge, Superior Court of
the District of Columbia
/signed in chambers/

Supreme Court, U.S.
FILED
APR 10 1992
OFFICE OF THE CLERK

No. 91-1474

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

NICHOLAS G. FARRINGTON,
Petitioner,

v.

THE BUREAU OF NATIONAL AFFAIRS, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

---

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PAUL E. MIRENGOFF
(Counsel of Record)
A. NEAL BARKUS
HUNTON & WILLIAMS
2000 Pennsylvania Ave., N.W.
Suite 9000
Washington, D.C. 20006
(202) 955-1500
Counsel for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

RESTATEMENT OF QUESTIONS PRESENTED

1. Was Petitioner's defamation claim against his employer precluded by the common law defense of consent where the alleged defamatory statements are contained in an evaluation of Petitioner's job performance that his employer was contractually obligated to provide, where the statements at issue were relevant to an evaluation of his performance, and where the evaluation was issued only to those with a legitimate interest in the subject matter?

2. Is Petitioner entitled to relief from summary judgment on the ground that he was not notified by the trial court of his obligation to file affidavits where there is no rule requiring the trial court to give such notice and where the trial court did not base its award of summary judgment on Petitioner's failure to file affidavits?

TABLE OF CONTENTS

	Page
RESTATEMENT OF QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
ARGUMENT	4
I. THIS CASE PRESENTS NO FEDERAL QUESTION	4
II. THERE IS NO CONFLICT OF AUTHORITY	5
III. THE DECISION BELOW IS CONSISTENT WITH FUNDAMENTAL PRINCIPLES OF DEFAMATION LAW AND WITH A PROPER BALANCING OF THE RELEVANT SOCIETAL INTERESTS	7
IV. PETITIONER'S MOTION FOR RELIEF FROM SUMMARY JUDGMENT WAS PROPERLY DENIED	8
CONCLUSION	9

TABLE OF AUTHORITIES

Cases: Page

Bryant v. Western Electric Co., Inc., 572 F.2d 1087 (5th Cir. 1978) 9
Exxon Corp. v. Schoene, 508 A.2d 142 (Md. App. 1986) 6
Kraft v. W. Alanson White Psychiatric Foundation, 498 A.2d 1145 (D.C. App. 1985) 3
Krasinski v. United Parcel Service, 530 N.E.2d 468 (Ill. 1988) 6
Luttrell v. United Telephone System, Inc., 683 P.2d 1292 (Kan. App. 1984), *aff'd*, 693 P.2d 1279 (Kan. 1985) 6
Mandelblatt v. Perelman, 683 F. Supp. 379 (S.D.N.Y. 1988) 6
McDermott v. Hughley, 561 A.2d 1038 (Md. 1989) .. 6
Rogozinski v. Airstream by Angell, 377 A.2d 807 (N.J. Super. 1977) 6

Other Authority:

Restatement (Second) of Torts § 583 (1977) 8
Rules of the Supreme Court of the United States, Rule 10 ..... 4, 5
District of Columbia Superior Court Rules of Civil Procedure, Rule 12-I(k) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1474

NICHOLAS G. FARRINGTON,
Petitioner,

v.

THE BUREAU OF NATIONAL AFFAIRS, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

---

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This is a defamation suit by an employee against his employer and former supervisors challenging a written performance evaluation with which the employee does not agree. Petitioner works for Respondent, The Bureau of National Affairs, Inc. (BNA), as a proofreader. In 1987 he was promoted to the job of reference file editor. Under the terms of the collective bargaining agreement between BNA and the Washington-Baltimore Newspaper Guild (the authorized bargaining representative for most BNA employees, including Petitioner), he began his reference file editor job in probationary status. The collective bargaining agreement required BNA to evaluate Petitioner's performance during each month of the three month probationary period and, in the event he did not pass proba-

tion, to perform a final evaluation stating the reasons why.[1]

Petitioner's supervisor, Respondent Valeria Bowman, concluded at the end of the probationary period that Petitioner had not performed his new job well enough to pass probation. As required by the collective bargaining agreement, she recorded her opinion in a written performance evaluation. That evaluation contained the following statements that Petitioner claims are defamatory:

> Nicholas' work did not improve to the necessary level of accuracy. Further, his work continued to reflect an inability to pick up less extensive but important changes and he also was not careful in crossing out for revision only the language affected. Since these essential skills were not mastered, he did not pass probation.
>
> Nick did not pass probation because of inaccuracies in mark-ups that he was not able to overcome, thus making his work unreliable.

This evaluation was signed by Bowman's immediate supervisor, Respondent Patricia Westlein. It was then sent to BNA's personnel office and placed in Petitioner's personnel file. Publication of the evaluation was limited to BNA's personnel office and, once he filed a grievance, its labor relations office and the union representatives pursuing his grievance.

Petitioner then filed this *pro se* defamation action in the Superior Court of the District of Columbia. Respondents moved for summary judgment on a number of theories. The only theory reached by the Superior Court was Respondent's argument that the alleged defamatory statements were absolutely privileged because Petitioner

---

[1] Petitioner knew when he accepted his promotion that it entailed being evaluated in this manner. He had been promoted on two prior occasions and on both occasions had received unfavorable evaluations during probation.

consented to being evaluated by his supervisors when he accepted his promotion. The Superior Court granted summary judgment on that basis. It concluded that under *Kraft v. W. Alanson White Psychiatric Foundation*, 498 A.2d 1145, 1150 (D.C. 1985), the statements contained in the performance evaluation were privileged because Petitioner consented to an evaluation of his work, because the statements at issue were all directly relevant to his ability to perform in the probationary position, and because the publication was limited to persons with a legitimate business interest in the subject matter of the statements.

In support of their summary judgment motion, Respondents filed certain affidavits. Petitioner did not file counter affidavits. The Superior Court, consistent with local rules and local practice, did not send any notice to Petitioner explaining the role of affidavits in summary judgment proceedings.

Petitioner moved for relief from summary judgment based in part on the theory that, as a *pro se* litigant, he should have received an explanation from the court regarding the importance of affidavits. However, Petitioner did not support his motion with any proffer as to what evidence he could have produced through affidavits that would have created a genuine material issue to be tried. In fact, Petitioner had admitted all of the facts upon which summary judgment was based during his deposition.[2] The Superior Court denied Petitioner's Motion for Relief from Summary Judgment.

---

[2] Petitioner admitted that BNA was required by the collective bargaining agreement to evaluate his performance, that the attributes discussed in his evaluation—accuracy and attention to detail—were necessary to successful performance of his job, and that he had no knowledge of anyone seeing his evaluation other than labor relations personnel and people involved in processing his grievance over the evaluation. Later, by operation of District of Columbia Superior Court Rule 12-I(K), he again admitted these facts when he failed to deny them in his Statement of Material Facts in Dispute.

Petitioner appealed both the initial summary judgment award and the denial of his Motion for Relief from Summary Judgment. The District of Columbia Court of Appeals affirmed both rulings. It agreed with the Superior Court's ruling on the substantive defamation issue. It did not reach the issue of whether the Superior Court should have sent Petitioner a notice explaining the need for affidavits because Petitioner did not proffer any disputed material issue of fact he could have raised through affidavits. None of the rulings in this case, whether by the Superior Court or the Court of Appeals, addressed any issue of constitutional or federal statutory law.

ARGUMENT

There are no special or important reasons why the Court should review this case. The case presents no issue of federal law. The federal question that Petitioner asserts exists was neither raised nor decided below. In addition, there is no conflict of authority here. To BNA's knowledge, no court has held that an employee may maintain a defamation action over performance related statements contained in a performance evaluation the employer was contractually required to issue. In any event, the decision below correctly resolved the common law defamation issues in the case.

I. THIS CASE PRESENTS NO FEDERAL QUESTION

Rule 10 of this Court suggests that, ordinarily, a writ of certiorari will be granted in the case of a decision by a state court of last resort only when the state court has decided a federal question. Here, the District of Columbia Court of Appeals decided no federal question. Instead, it simply decided an issue concerning the local law of defamation. Accordingly, no review of the decision below is appropriate.

Petitioner contends that there is a federal question in this case, namely "does malicious libel enjoy constitutional protection in the form of an absolute privilege for

an employer when an employee has consented to an evaluation of his job performance. . . ." (Petition at 18). However, the District of Columbia Court of Appeals did not decide that question. It merely decided that Petitioner's defamation claim was "precluded by the defense of consent which rendered the publication that occurred privileged under the circumstances of this case." (Opinion at 2). Thus, the decision turned on an analysis of the nature of the defense of consent in defamation cases, not on the question of what constitutional protection the speech in question might enjoy. BNA never raised the Constitution as part of its defense, and neither the trial court nor the Court of Appeals discussed the Constitution or any federal statute. The fact that Petitioner cited Supreme Court cases to both courts does nothing to advance his apparent claim that the Court of Appeals decided a federal question.

The other issue raised by Petitioner—whether *pro se* litigants faced with a summary judgment motion are entitled to a warning from the trial court about the consequences of not filing affidavits—likewise raises no federal question. The question of what notice, if any, must be sent to *pro se* litigants by state courts is governed by the local rules or practice of the court in question.

II. THERE IS NO CONFLICT OF AUTHORITY

Under Rule 10 of this Court one consideration in determining whether a petition for certiorari should be granted is whether the decision conflicts with the decision of another state court of last resort, a United States court of appeals, or an applicable decision of this Court. Here there is no such conflict.

To the best of BNA's knowledge, no court has ever held that an employee may sue his employer for defamation over statements contained in a performance evaluation the employer was contractually required to issue where the statements contained in the evaluation are directly relevant to employee's ability to perform and

where publication is limited to persons with a legitimate business interest in seeing the statements. None of the cases relied on by Petitioner so holds.[3] Similarly, Petitioner points to no case which holds that a non incarcerated *pro se* litigant is entitled to an explanation of the need for affidavits in opposing summary judgment. Moreover, even if Petitioner could point to such a case, this would prove only that the District of Columbia Superior Court has a different practice than the court cited. There would still be no need for this Court to become involved.

---

[3] *Rogozinski v. Airstream by Angell*, 377 A.2d 807, 817 (N.J. Super. 1977), involved a response to a request for information from the Unemployment Compensation office. The Court found that the employee's implied consent was limited to a statement by the employer of the reasons for the employee's separation. The *Cary* case cited at page 29 of the Petition apparently is simply a jury verdict with no opinion by the court about the scope of the defense of consent in the context of an employee performance appraisal. *Luttrell v. United Telephone System, Inc.*, 683 P.2d 1292 (Kan. App. 1984), *aff'd* 693 P.2d 1279 (Kan. 1985), holds that intracorporate communications are publications for purposes of defamation law and suggests that alleged oral statements about the misconduct of an employee state a claim of defamation. *Krasinski v. United Parcel Service*, 530 N.E.2d 468, 471 (Ill. 1988), also involved statements made by agents of the employer during an investigation of employee misconduct. Neither Luttrell nor *Krasinski* reached the issue of what type of privilege obtains in the case of employee evaluations made pursuant to a collective bargaining agreement. *Mandelblatt v. Perelman*, 683 F.Supp. 379, 383-84 (S.D.N.Y. 1988), holds that an employee cannot sue on the basis of statements in a termination notice because he had bargained for the right to receive such documents and had every reason to expect that the notice would contain unfavorable views. Thus, *Mandelblatt* supports the ruling below. *Exxon Corp. v. Schoene*, 508 A.2d 142 (Md. App. 1986), holds that an absolute privilege does not apply where a former employee is accused in a public restaurant of stealing by his employer. *McDermott v. Hughley*, 561 A.2d 1038 (Md. 1989), holds that an absolute privilege does not apply under a consent theory where a psychologist tells an employee he will issue a report about him to an employer which will contain specific favorable findings, the employee agrees to the issuance of that report, and the psychologist then issues a report which contains findings that contradict those he promised to give.

III. THE DECISION BELOW IS CONSISTENT WITH FUNDAMENTAL PRINCIPLES OF DEFAMATION LAW AND WITH A PROPER BALANCING OF THE RELEVANT SOCIETAL INTERESTS

Even if this Court were inclined to review a local court's interpretation of the law of defamation, there would be no reason to review the unexceptional interpretation rendered by the court below in this case. Petitioner argues that the ruling below must be overturned so that employees in the District of Columbia will not be left defenseless against employers who wish to lie about them in performance evaluations. In fact, however, employees in the District of Columbia have substantial protection from being injured by defamation in the evaluation process. They are protected from defamatory statements that are not relevant to an evaluation of their performance and from the publication of the evaluation to individuals who lack a legitimate interest in seeing it. Thus, they are protected from gratuitous statements and gratuitous publication.[4]

Moreover, employees have a built in protection against bad faith in the evaluation process: supervisors have no incentive to give unfavorable evaluations to employees they honestly believe are good employees. If employees or their bargaining representatives feel that this protection is not enough, they can bargain for the right to challenge evaluations they feel are in bad faith.

This Court should not replace the sensible approach described above with one in which the privilege for statements contained in contractually mandated performance evaluations is qualified by a requirement that the evaluations be made in good faith. Under such a regime, em-

---

[4] Respondents emphasize that in this case BNA did not have the option of saying nothing about Petitioner's performance. When an employer has that option, the law in the District of Columbia is that, absent express employee consent, only a qualified privilege protects the employer's statements. This constitutes additional protection against gratuitous bad mouthing of employees.

ployers would confront the choice of either saying nothing in evaluations that could offend an employee, thereby rendering the evaluation process meaningless, or regularly litigating over evaluations with unhappy employees. Many employers would opt for abandoning meaningful employee evaluation. For the remainder, the District of Columbia courts would become an employee evaluation review board.

Finally, the rule applied by the court in this case is fully consistent with accepted principles of defamation law. Petitioner relies on the Restatement (Second) of Torts for the view that his consent to being evaluated was limited to consent to a "fair and honest" evaluation. However, this case is substantially the same as the second illustration of § 583 of the Restatement. There, a discharged employee asks for publication of the reasons for his discharge. According to the Restatement, the employee has consented to the publication of whatever the employer has to say about the matter.

Here, Petitioner, through his union, asked the Respondents for a statement of the reason for his failure of probation. He consented to whatever statements the Respondents made on the subject as long as those statements were relevant to performance and not excessively published.[5]

IV. PETITIONER'S MOTION FOR RELIEF FROM SUMMARY JUDGMENT WAS PROPERLY DENIED

As the Court of Appeals held, Petitioner's contentions regarding lack of notice about the consequences of failure to file affidavits are baseless because he did not

---

[5] As the Court of Appeals below explained, Petitioner's argument boils down to the proposition that he consented only to a truthful evaluation of his performance. However, "to conclude that [Petitioner] consented only to the publication of true statements about his work would render the defense of consent meaningless in this case [since] truth is a complete defense to a claim of defamation without regard to whether the one defamed consented to the publication of those statements." (Opinion at 4).

proffer any disputed material issue of fact that would have been raised in an affidavit had he received such notice. (Opinion at 6, n.3). Indeed, as noted above, Petitioner admitted at his deposition the handful of facts underlying the award of summary judgment. An affidavit attempting to repudiate Petitioner's prior sworn testimony on any of these points would have been entitled to no weight. *See e.g., Bryant v. Western Electric Co., Inc.*, 572 F.2d 1087, 1088 (5th Cir. 1978).

CONCLUSION

For the foregoing reasons, Respondents request that the petition for certiorari in this case be denied.

Respectfully submitted,

PAUL E. MIRENGOFF
(Counsel of Record)
A. NEAL BARKUS
HUNTON & WILLIAMS
2000 Pennsylvania Ave., N.W.
Suite 9000
Washington, D.C. 20006
(202) 955-1500
Counsel for Respondents

APPENDIX

PARENT COMPANIES AND SUBSIDIARIES OF RESPONDENT THE BUREAU OF NATIONAL AFFAIRS, INC.

The McArdle Printing Company, Inc. (Subsidiary)

Pike & Fischer, Inc. (Subsidiary)

BNA Washington, Inc. (Subsidiary)

BNA International, Inc. (Subsidiary)

Tax Management, Inc. (Subsidiary)